

# **EXHIBIT “13”**

implementing regulations. Each of their enrollments gives rise to the presumption that the statements contained therein are true and accurate. In order to overcome the rebuttable presumption, the protestant had to, but failed, to introduce evidence negating each enrollee's ties to the village and each enrollee's subjective intent to return.

The absence of individualized evidence pertaining to the other enrollees, Stratman's failure to negate their subjective intent to return to the Native Village of Woody Island, and his failure to introduce specific, objective evidence pertaining to 237 of the 285 enrollees results in Stratman having failed to overcome the presumption that the statements of each Alaska Native on the official government enrollment forms was true and accurate.

By failing even to discuss approximately 237 of the 285 enrollees, and failing to introduce any evidence to negate their subjective intent to return to the Native Village of Woody Island, Stratman has not shown by a preponderance of the evidence that there were less than the required number of permanent residents of Woody Island as of April 1, 1970. The RD recommending decertification should therefore be rejected by this Board.

**G. The Native Village of Woody Island had an Identifiable  
Physical Location on April 1, 1970.**

Woody Island is a small island approximately 2.8 miles long and 1.8 miles wide situated about one mile east of Kodiak, Alaska. (Book 77 at p. 47.) Photographic, archeological, and testimonial evidence introduced at the hearings showed that the Native Village portion of Woody Island had an identifiable physical location as of April 1, 1970. The Village consisted of the Garden Beach area, the North Village area, the South Village area, and the Mission

area<sup>120</sup> now used as Camp Woody. See, "A Walk In Time", L-Doc A9; Testimony of Chris Wooley, Tr. at pp. 2360-2364.

There is no requirement that the Native Alaskans hold fee simple title to property that they used in order for that property to qualify as part of the village. For example, the Robertson family made use of its homesteaded property although title to the homestead had never been perfected, and Johnny Maliknak and Nick Pavloff lived in the village although they never obtained title to property that had been foreclosed upon by the Kodiak Island Borough. Many Alaska Natives used property owned by Tina Hoen, and their use of the home qualifies as having lived in the "village" even though these individuals did not own the home.

A substantial amount of evidence was presented establishing the physical location of the village, and various Native homes<sup>121</sup>, structures, and grave sites in the village.

There are a number of graves and cemeteries located in the village. Site 24, identified by archeologist Chris Wooley, is the Alaska Heritage Resource Survey KOD-603, which is the mass grave of the 1918 Spanish flu victims. According to records of the Kodiak Baptist

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<sup>120</sup>Dr. Nancy Yaw Davis, an expert anthropologist with a thorough understanding of Alaska Native cultures, testified that the Mission area is part of the Village of Woody Island. She observed that "I think with the, the Mission connection for many of those people who chose to enroll to Woody, this was a connection to their Native identity, their Alaska Native identity. And I see the Alaska Native Claims Settlement Act should be supportive of those individuals who are Natives." Tr. at p. 3484. She further elaborated that there "was a sense of the Mission being a kind of family, for some people the only family. And it certainly is a connection. It is the Mission to those descendants, as Angeline is to the North Village and Ella is, is to the South Village." Tr. at pp. 3508-09.

<sup>121</sup>A number of Native homes in the South Village portion of Woody Island Village are depicted in the 1959 aerial photograph, Phot 9-7, the 1965 aerial photograph, Phot 1-2, and the 1967 aerial photograph, Phot 1-3.

Mission, on October 30, 1918, the vessel *Admiral Farragut* arrived at Woody Island with a new matron. The vessel also carried the deadly Spanish influenza. Within two weeks, all the mission boys and most of the girls and staff were ill. Nick Fadaoff and two other men were not ill, and took over care of the livestock, getting water and wood, waiting on the sick and burying the dead. With so many dying at one time, coffins could not be made. Many of the dead were wrapped in bedding and buried in this mass grave. One child from the mission and 26 villagers -- 14 men, 6 women and 6 children -- died in October/November of 1918. The situs of the mass grave is sometimes referred to as the "jumping hill" from which children decades later would jump to the sandy beach beneath. (Chris Wooley, "A Walk in Time", L-Doc A9 at p. 37.)

The Russian Orthodox graveyard and the graves of Nicholas Pavloff (1846-1932) and his ancestors are on Woody Island at site 22 identified in the Chris Wooley archeology report, "A Walk in Time," at p. 34. This tract of land is depicted in U.S. Survey 603-B, from 1905, in L-Chart 21, named "Russian Greek Church Mission Reserve Tract B, Area 1.46 acres. The Russian Orthodox Church and grave sites are pictured in the Alaska State Library photographic collection at L-Phot-3, entitled "Russian Church, Wood Id. Alaska" mid to late 1800's. The Russian church, known as "The Church of The Annunciation" was "built at the expense of [the American Russian Ice Company] for the use of the natives [and] is a splendid structure for that country. It is to be furnished with images and decorations imported from St. Petersburg." See, February 1, 1869 edition of the Alaska Herald Newspaper, San Francisco. The Russian cemetery is depicted in U.S. Survey No. 603, Russian Greek Church Mission Reserve situated

at Woody Island (1905). (L-Doc 175a; Chris Wooley, "A Walk in Time", at p. A-9);

Other members of the Pavloff clan are buried at site 4 identified in the Walk in Time publication by archeologist Chris Wooley. This land is depicted in U.S. Survey 1676, page 245, and is pictured in L-Phot 28-064. This 16.61 acre homestead contains the remains of several cabins, banyas, sheds, dwelling houses, as well as some gardens. Pictured are L-Phot 28-048 through 28-063. The original U.S. survey No. 1676 is recorded at Book 81, page 24 of the records of the Kodiak Recording District, L-Chart 24A. (Chris Wooley, "A Walk in Time", L-Doc A9 at pp. 16-17; L-Chart 24A; L-Chart 24B.)

Leisnoi shareholder residents of the dwelling house depicted in the 1926 homestead survey of Nicholas Pavloff (U.S. Survey 1676) included:

Angeline Panimarioff Pestriakoffs Pavloff Maliknak	1960-1966
John Maliknak	1960-1970
William Wilfred Pavloff	1960-1967
Herman Ponchene	1960-1970
Natalie Ponchene	1960-1970
Nicholas "Nick" William Pavloff, Sr.	1965-1970
Paul R. Harmon	1965-1970 (Seasonal)

(L-Doc A9 at p. 17; and L-Doc 108 at Tab 5, p. 2.)

The Nicholas Pavloff Homestead ultimately fell into the hands of the Kodiak Island Borough due to tax foreclosure for unpaid taxes. See, L-Chart-27. The institution of property taxation by the Kodiak Island Borough on the Woody Island Natives was an act of governmental authority that occurred within the ten years predating April 1, 1970, following the formation of the Kodiak Island Borough.

Also located on the original Nicholas Pavloff homestead (U.S. Survey No. 1676 -

Surveyed in 1926), is the Sundberg home site and grave site. Located in the North Village area, the home site was Wilfred Pavloff's home in the 1940's when it burned, and was later rebuilt by Rudy Sundberg. The ruins remain partially standing today, and are pictured in Leisnoi photos Phot 28-028 through 28-038. Various household items dating from the 1950's, 60's, and 70's, including a Motorola black and white tube-style television set, dishes, electric iron, snow sled, a Schwinn bicycle, and a stove in the banya ruins are visible to this day. Residents of the Rudy Sundberg house during the period 1960 through 1970 included Rudy Sundberg, Sr., Rudy Sundberg, Jr., Esther DeNato, Anita Hartman, and Herman Sundberg. (Chris Wooley, "A Walk in Time", L-Doc A9, at p. 18; L-Chart 24B; L-Doc 108 at Tab 5, p. 2; and Phots 28-028-047.)

Another cemetery on Woody Island is the "Children's Cemetery" identified as site 14 in Chris Wooley's publication, "A Walk in Time." and pictured at L-Phot 28-095 through 28-100. Many children who died on Woody Island from whooping cough and various other ailments that plagued the Native community are mentioned in the orphanage newsletter as having been buried there. A photograph from the Learn collection shows the graveyard behind the mission barn. ("A Walk in Time", L-Doc A9, at p. 25; Learn collection, Phot. 19-19.)

Mike Chabitnoy, the husband of Ella Chabitnoy, who grew up on Woody Island and served this country in World War I, is buried on Woody Island at Site 21, listed in the Chris Wooley archeology report, "A Walk in Time." The grave site of Mike Chabitnoy (April 6, 1895 to April 2, 1958), is pictured in the Chris Wooley photo collection at Phot. 28-138. (Chris Wooley report, "A Walk in Time", L-Doc A9, at p. 7; Phot. 28-138.)

Danny Harmon, one of the many Harmon brothers, died tragically in Vietnam shortly

before he was to return home from active duty. His brother Maurice selected the gravesite at a spot where Danny had indicated he wanted to build a cabin. That site, Site 2 in the Chris Wooley archeology report, is shown in the Chris Wooley photographic collection at Phot. 28-001 through 28-006b.

Another site relevant to show an identifiable location of the Native village on Woody Island is site 6 in the Chris Wooley report, the William Pavloff/Angeline Maliknak home site. Angeline had lived in this house with her husband William Pavloff and their children, Nicholas William Pavloff, Sr., Agnes Pavloff, Dortha W. Pavloff, William Pavloff, Martin W. Pavloff, Maria W. Pavloff, and Mattie Pavloff. The Pavloff home is pictured in the National Geographic collection, Phot. 21-10. Angeline later married Steven Maliknak and they lived in the home as well. The outline of the house is visible next to a pile of lumber that was salvaged from the house after abandonment. Structural debris and artifacts are still visible as shown in the Chris Wooley photo collection, Phot. 28-048 through 28-064. This is the main Pavloff house referred to in discussion of U.S. Survey No. 1676 above. Persons who lived or spent significant periods of time in the Pavloff house during the time period 1960 through 1970, include Angeline Pananarioff Pestriakoffs Pavloff Maliknak, John Maliknak, William Wilfred Pavloff, Herman Ponchene, Natalie Ponchene, Nicholas "Nick" William Pavloff, Sr., Nick Andy Pavloff and Paul R. Harmon. (Chris Wooley, "A Walk in Time," L-Doc A9 at p. 19; Document 108 at Tab 5, p. 2; Phot. 21-04; and Phot. 28-048 through 28-064.)

Another site on Woody Island relevant to show an identifiable Native village on Woody Island is the "Frump Home Site", site 7 discussed in the Chris Wooley Archeology Report. The Frump house is visible in the aerial photograph Phot. 1-3, and is labeled in Overlay 2,

printed by Maurice Harmon. The House is in the North Village area. The home was occupied by Agnes Pavloff Frump, Harold Frump King, Brenda Frump Pickett, and Mary Anne Frump Bezates during the 1960s, until Agnes Pavloff Frump died in a 1963 boating accident. Her son, Harold Frump King, testified at the hearings. (Chris Wooley Report at pp. 7, 10, 20; Doc 108 at Tab 5 p. 2; Phot. 1-3 Overlay 2.)

Site 11 in the Chris Wooley archeology report is the Nicholai Maliknak/Paul Wolkoff home site. Giorgi Nekeferoff was born on September 9, 1899 and died on May 3, 1978. His family name, Nekeferoff, is found in derivations on early Woody Island since its records. Although he often lodged at the Kodiak jail for alcohol related reasons, he spent much of his adult life on Woody Island in the North Village area at Garden Beach at the home site labeled Site 10. (Chris Wooley Report at pp. 7, 10, and 22.)

Site 17 in the Chris Wooley Archeology Report depicts the Harmon home site. The home site originally was occupied by Eli Alakak and his son John, and then by the Andersons. After that time, it was part of the Dora Miller estate. In the late 1940s, Sarah Lowell lived there. The Harmons lived in the home starting in the mid-1950s. In her log book on October 4, 1970, Yule Chaffin referred to it as "Hartle's old place" and also mentions the "Harmon pond" (the pond adjacent to the site.) Persons who lived in the Harmon house during the early 1960s included Anastasia Fadaoff, Harmon Hartle, Maurice Harmon, Daniel Harmon, Michael "Mitch" Komm Gregoroff; Leona Harmon Castillo; James Hartle; and Rayna Harmon Whetham. Ruins of the Harmon's residence and banya including a large propane water heater are located on the hillside. The door of an old vehicle, possibly from one of the automobiles the Harmon brothers owned, is also present at the site. Photographs of the Harmon house ruins



are pictured in the Chris Wooley collection at Phot. 28-110 through 28-118. (Chris Wooley Archeology Report at pp. 6, 7, 29; Doc 108 at Tab 5 p. 3; and Phot. 28-110 through 28-118.)

The Chabitnoy and Simeonoff home sites were situated in close proximity to each other on Woody Island in the South Village area. They are depicted in the Alaska State Archaeological Collection at Phot. 3-3. The Chabitnoy and Simeonoff home sites are Sites 19 and 20 in the Chris Wooley Archeology Report. The home sites were burned in the mid-1970s. The Chabitnoy house ruins are pictured in the Chris Wooley photographic collection at photographs Phot. 28-120 through Phot. 28-131. The Simeonoff house ruins are pictured in the Chris Wooley photographic collection at Phot. 28-132 through 28-137. Occupants of the Chabitnoy and Simeonoff houses include the following:

Ella Chabitnoy	1960-1966
Cecil Chabitnoy	1960-1970
Mickle (Mickey) Chabitnoy	1960-1963
James O. Fadaoff	1960-1965
Rosemary Challiak	1960-1965
Paul Harmon	1965-1970 (Seasonal)
Simeon "Buddy" Fadaoff	1960-1962
Karl Armstrong, Jr.	1970 (Seasonal)

(Chris Wooley Archeology Report at pp. 6, 7, 31-32; L-Doc 108 at Tab 5, p. 3; Phot. 3-3; Phot. 28-127 through 28-137.)

The Fadaoff/Madsen house was originally the World War II submarine sounding station. The home was rebuilt from the lumber salvaged from the submarine sounding station, and exists to this day. The home is presently owned by retired Superior Court Judge Roy Madsen, a Leisnoi shareholder. The Madsen/Fadaoff house is pictured at Phot. 28-140 through 28-144. (Chris Wooley Report at pp. 6-7 and p. 35; L-Doc 108 at Tab 2, p. 93 and Tab 5, p. 2.)

Patricia Hampton, the daughter of Yule Chaffin, described a number of homes on Woody Island:

“Nick W. Pavloff and John Maliknak lived on Woody Island ... [n]ear the dock.”  
Deposition of Patricia Hampton at p.8.

“Nick built a house for his wife and his three children near the beach... I don’t know when he built that... It was before the tidal wave. ... [I]t was a beautifully made house.”  
Deposition of Patricia Hampton at pp.8, 17.<sup>122</sup>

“A family named Frump used to live there in that house... Agnes Frump and her three children lived there in that little shack... The one that Nick -- as far as I know, that Nick was not staying in or was this summer [of 1977]”  
Deposition of Patricia Hampton at p.9.

“[T]here used to be another house there by that little shack that I spoke of that Nick lived in. There was another home there, a very large home, where Nick’s grandmother, I believe it was, lived there... And his brother.”  
Deposition of Patricia Hampton at p. 13.

“This Tina Hoen... She and her family lived in -- there were two houses here.”  
Deposition of Patricia Hampton at p. 19.

“Tina Simeonoff. Simeonoff. All right, they lived in a house, a brick house, near the dock area. And there was another house next to them where Ella Chabitnoy lived... The

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<sup>122</sup>In her live testimony, Patricia Hampton clarified her testimony about this structure: “I ... thought at the time ... that the house that Nick and Mary ... lived in was built by Nick and I found that to be an error... I believe that Edson Fadaoff, Mary’s first husband, rebuilt the home from an existing structure.”

Simeonoffs owned that one brick house. They had a garden, they had a little Banya [a Native steam bath] there. They had a -- he had a little workshop. The Chabitnoy house, which was next to that, also had a little - a workshop and their own garden. And then the graves behind their houses... And then the other little cluster of houses, one of which was also in that picture, is the Nick Pavloff home that he built for his wife and his garage and little workshop there.”

Deposition of Patricia Hampton at pp. 19, 68<sup>123</sup>

“[T]owards Tanignak Lake, there’s two old houses back there..”

Deposition of Patricia Hampton at p. 68.

Present landownership on Woody Island is depicted at L-Chart 27. The chart makes it readily apparent that Leisnoi, Inc. did not receive title to any of the land on the western, historic side of the island. Rather, Leisnoi was relegated to the far, eastern side of the island, and only received land with steep cliffs and no practical moorage that was more than two miles from the Kodiak city limits.

The RD erred in recommending that this Board find “the alleged Village failed to meet the requirements of being a ‘Native village’ and having an identifiable physical location... The alleged Village merely had less than a half-dozen houses which weren’t being occupied with any frequency or consistency and generally were not well-maintained by 1970...The existence of several houses, without more, does not constitute the location of a community with social, economic, and cultural ties” RD at pp. 92, 94. In fact, there is no set minimum number of

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<sup>123</sup>In her live testimony, Patricia Hampton testified that she had been inside a number of the Native homes: “I was in Site Number 17, the Harmon homesite, ... Site 19, the Simeonoff homesite, ... Site 20 the Chabitnoy homesite, .. and Site 23, the Fadaoff-Madsen homesite... and Maryanne Frump’s house...” Tr. at pp. 171-72.

houses required in order to constitute a village, nor is there a legal requirement that the houses be well maintained to the standards that Caucasians would find appealing.

Judge Roy Madsen stated that in 1970, "[T]he **Chabitnoy house**<sup>124</sup> was there. And it was in pretty good state of repair at that time... The **Simeonoff house**, which is right next door and behind my place, was still standing. And it was habitable... **Angeline Pavloff's house**<sup>125</sup> was still standing. I went there to visit up there... And **the cabana** that was in use there, you know, Johnny was still using it to take steam baths in... And **Rudy Sundbergs smokehouse** was still there. And gear storage was still there..." Tr. at pp. 2878-2879.

Yule Chaffin's notes reveal that the **Harmon house** was still standing in 1970.<sup>126</sup> Karl Armstrong testified that numerous persons such as himself, Charlie Naughton, Eddie Hall, Marie Redick Ungar, and the Redick children lived in the **Hoen home** on Woody Island in 1970, so that home was obviously habitable as well. Depos. Tr. of Karl Armstrong at p. 114.

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<sup>124</sup>The Chabitnoy home is pictured behind Herman Ponchene in a photograph taken in the early 1960's, Phot A-1-072. See, Testimony of Patricia Hampton, Tr. at pp. 202-03.

<sup>125</sup>The Pavloff home is pictured with Angeline Pavloff, Edson Fadaoff, Jr., and Joseph Fadaoff in an August, 1960 photograph, Phot A-1-032. Patricia Hampton observed that "It looks like it was taken at Nick and Mary Pavloff's home." Tr. at p. 201

<sup>126</sup> "Q. [T]he Harmon homesite. When was it built?  
A. ...[I]t dates back into the early 1900s, perhaps around 1920 or '30 or so, and that it, it was later improved upon by various families that occupied it.  
Q. And do you believe it was occupied in '60?  
A. Yes, I do.  
Q. And do you know it was standing in 1970?  
A. Yes, I do. Matter of fact, Ms. Yule Chaffin notes walking by that house in 1970."

Cross examination of Frank Feichtinger by counsel for protestant, Tr. at p. 1337. See also, Yule Chaffin's diary, Exhibit 17 to her deposition.

He also confirmed that the **Pavloff house** was habitable and was used in 1970: "It wouldn't be perhaps for -- like you described, the middle class American, but for Native people that are -- Q. People actually used it in 1970? A. Yes." Karl Armstrong also described the **Chabitnoy house** in 1970 as being "occupied more than it was not, I'll put it that way, at least during the summertime. It was adequate shelter and I don't know who but somebody had taken visqueen and put it up on the windows and doors... This house was habitable." Depos. Tr. of Karl Armstrong at p. 121.

The **Fadaoff house** is still standing to this day, and Joey Fadaoff testified that his family stayed in it when they went to Woody Island in 1970. Tr. at p. 1086.<sup>127</sup>

Even Tim Smith, the Protestant's own witness, testified that "I would have considered [the **Chabitnoy house**] habitable", and he testified that the **Simeonoff house**<sup>128</sup> "had a roof, a door, windows or plastic over the windows, and stated that sometimes there would be someone living in one of the houses" in 1970. Tr. at pp. 1971-1972. Tim Smith also testified that the **Fadaoff house**, which was later purchased by Judge Roy Madsen, had been better carried for than the Simeonoff house, and was about as well-maintained as the Chabitnoy

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<sup>127</sup>The Fadaoff home is visible in photographs of Mary Ponchene Fadaoff Pavloff, Nick Pavloff, Edson Fadaoff, Jr. and Joseph Fadaoff in 1962. Photos A-123 through 130. Tr. at pp. 203-204. A photograph of the home as it presently looks is pictured at Phot 28-143.

<sup>128</sup>A September 30, 1967 aerial photograph of Woody Island (Phot 1-3), labeled by Joseph Fadaoff in Overlay #1 and by Maurice Harmon in Overlay #2, shows the Simeonoff house, the Chabitnoy house, the Fadaoff house, the Pavloff house, and the Frump house. A comparison of that September 30, 1967 aerial photograph with an earlier August 28, 1965 aerial photograph of the same area reveals, with the aid of a magnifying glass, that a fence was constructed around the Chabitnoy property sometime between the dates of the two photographs. The construction of a fence around the Native property evidences use and occupancy of the village. The presence of the homes reveals an identifiable physical location of the Woody Island village.

house: "A. In 1970, the Chabitnoy house and the -- what is now the Roy Madsen house would have been about on par.

Q. Were they --

A. Habitable."

Tr. at p. 1986.

Esther DeNato testified that the **Frump house**, marked in Phot 1-3, overlay No. 1, was still standing "until the Year '86." Tr. at pp. 2818-19.

Frank Feichtinger testified that the **Sundberg house** "was standing and being used in 1970."<sup>129</sup>

Tina Simeonoff Hoen testified that she allowed Karl Armstrong and Marie Ungar to use the **Hoen house**<sup>130</sup> on Woody Island in 1970. Tr. at p. 2965.

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<sup>129</sup>"Rudy Sundberg constructed that home sometime in the 1930's." Q. What was its condition in 1960, if you know?" A. "Standing and being used." Q. "Seventy?" A. "I believe it was standing and being used... [T]he house stands on part of the old Pavloff home's land." Testimony of Frank Feichtinger, Tr. at pp. 1331-33.

<sup>130</sup>Charles Naughton testified at pages 32-33 of his deposition that when he went to Woody Island he would sometimes stay at Tina Hoen's home, that he described: "Oh, jeez. How long is this room here, 20 feet? Might be 40 by -- it's a pretty big house. You know, I don't know the size but it's a pretty big house and they've got a lot of outhouses and stuff. A garden, a little fence around there... It always seemed there was someone there..."

Archeologist Chris Wooley, who thoroughly researched the structures of Woody Island,<sup>131</sup> testified that the village did have an identifiable physical location in 1970 and that it was used consistently with the cultural patterns and lifestyles of the Native Woody Islanders:

Q. Now, based upon the materials, again, which you did, the archeological materials, the photographs that you looked at, the plats which have spoken of here, do you, do you have a, any opinion as to whether or not Woody Island had an, an identifiable, physical location on April first of 1970?

A. Yes.

Q. And what is that opinion?

A. That there were structures inhabited and inhabitable on the west side of Woody Island in, in 1970. I think that movie yesterday showed us additional information that, the Chabitnoy house standing. And the evidence from up in the north village area I think is pretty clear, as well, that those structures have, were available for use at that time... the Motorola television, the remains of that TV laying (*sic*) out there behind the Sundberg house ... with the electric iron in the, in the ruins of that house was pretty, pretty good evidence, of, of use and occupation in that time.

Q. In that time? and "that time" being -

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<sup>131</sup>Chris Wooley described his methodology: "First thing I did was look at the plats; go to the BLM ... and pull every plat that I could find ... for Western Woody Island, and compile that information, along with the notes of the surveyors ... Then I looked at the photographic information ... to try to match up photographs to the plats to areas in question... Then looked at the, the photographs in different collections, some of which are from the National Archives and elsewhere, local collections, to try to identify those same, those same structures from the plats... And then I also looked at the ... information that came along with the photographs; and discussed ... the families in these photographs with .. Frank Feichtinger and Nancy Davis as they were continuing their work and collecting information. Then I went to the field. Then I went to Woody Island ... and conducted an archeological survey; looked at the reported location of these houses; ... walked western Woody Island and found evidence that matched both the... photographic record and the ... plat information, the land-use plats, as well as the ... information provided by people who were interviewed regarding the fact that there were houses, there were cabanas, there were sheds, there were gardens, there were graves. And I mapped those, photographed them, described them in my notes..." Tr. at pp. 2346-2349.



A. In, in 1970.

Testimony of Chris Wooley, Tr. at pp. 2361-62.

Ample evidence of homes in the village utilized by Natives in 1970<sup>132</sup> consistent with their own cultural patterns and lifestyles was thus presented at the hearings, so the ALJ erred in concluding there was no village on Woody Island simply because "Leisnoi is not included" in a publication entitled 'Alaska Natives and the Land', Exhibit S-1, dated October 1968, that was "prepared by the Federal Field Committee for Development Planning in Alaska..." Recommended decision at p. 93.

The Native Village of Woody Island had an identifiable physical location, and more than 25 permanent residents as of April 1, 1970. More than 13 enrollees actually lived in the village for a period of time in 1970. Accordingly, the Native Village of Woody Island qualifies as eligible for benefits under the Alaska Native Claims Settlement Act.

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<sup>132</sup>Chris Wooley testified about the occupancy and use of Woody Island:

Q. "[D]id you have an opinion as to whether or not... that physical location was evidenced by occupancy consistent with the Natives' own cultural patterns and lifestyle? ...

A. Yes ... [I]t was a village...

Q. [Do] you have an opinion as to whether the, at least 13 persons enrolled to Woody Island actually used the, the village during 1970 as a place where they actually lived for a period of time.

A. Oh, yes.

Q. And your opinion is -?

A. That they did...

Testimony of Chris Wooley, Tr. at pp. 2364-66.



**IV. ALTERNATIVELY, THE TRADITIONAL VILLAGE WAS  
TEMPORARILY ABANDONED BY VIRTUE OF ACTS OF  
GOD AND GOVERNMENTAL AUTHORITY OCCURRING WITHIN  
TEN YEARS PREDATING APRIL 1, 1970.**

There is no dispute that an earthquake and Tsunami wave struck Woody Island and Kodiak in 1964. Dramatic testimony about this event was given, for example, by Mitch Gregoroff. He described how three waves impacted Kodiak leaving "nothing left of the town or the canneries or anything there on the, on the waterfront." Tr. at p. 1401. For a period of time "[T]he channel between Kodiak and Woody almost looked like it dried up and it rose again. It was pretty awesome." Tr. at p. 1401. The Woody Island dock floated into Kodiak. Tr. at p. 1402.

Since an Act of God occurred within the 10 years predating April 1, 1970, and the Protestant alleges that the village had become abandoned, the Act of God proviso of 43 CFR §2651.2(b)(2) is brought into play. Leisnoi, Inc. relies upon this provision as an alternative basis for its certification, although it contends that it meets the statutory requirements imposed by ANCSA. The subject proviso reads as follows: "*Provided*, That no village which is known as a traditional village shall be disqualified if it meets the other criteria specified in the subsection by reason of having been temporarily unoccupied in 1970 because of an Act of God or governmental authority occurring within the preceding 10 years." 43 CFR §2651.2(b)(2).<sup>133</sup>

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<sup>133</sup>The Act of God or governmental authority proviso affects the burden of proof. As was noted in *Afognak*, "Appellant's burden of proof is significantly affected by the operation of the 'Act of God' proviso in 43 CFR 2651.2(b)(2) ... [T]he proviso thrusts upon appellant the necessity of proving, not only that a state of unoccupancy existed, but that such unoccupancy was not 'temporary' within the meaning of the regulation ... Application of the 'Act of God' proviso excuses the requirement of occupancy in 1970. Therefore this unoccupancy cannot legitimately be used to prove that 25 or more Natives were not residents of Afognak on April

In Part III(C) of this Brief, Leisnoi demonstrated that, contrary to the suggestion of page 86 of the RD, the Native Village of Woody Island is a traditional village. Indeed, the history is rich, well documented, and full of interesting examples of Native life, the impact of contact with the Russians, evangelization by the Baptists, and the role the village played in the history of the region.<sup>134</sup> For purposes of the regulatory proviso, the issue thus becomes whether an Act of God or governmental authority occurring within the 10 years predating April 1, 1970 was the cause of a temporary abandonment of the village.

The earthquake and tsunami wave, as well as number of Acts of God and governmental authority, individually and in conjunction with each other caused Native Woody Islanders to leave the village. Such Acts of God and governmental authority occurring within the ten years predating April 1, 1970 include:

- (i) The March 27, 1964 earthquake and tidal wave;
- (ii) The May 27, 1969 closure of the FAA school;

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1, 1970. Since occupancy, or unoccupancy, of a place is normally a significant objective indication of residence there, appellants undertake a difficult burden of proof." *Afognak* at pp. 22-23. Likewise, in *Chenega*, Chief Administrative Law Judge Luoma wrote "[A]pplication of the act of God proviso excuses the requirement of occupancy in 1970... Therefore, unoccupancy itself is not proof that 25 or more Natives were not residents of Chenega on April 1, 1970. Needless to say, the burden on Appellant to prove that there were not 25 Native residents of Chenega on April 1, 1970, is nearly impossible." *Chenega*, Recommended Decision at page 9.

<sup>134</sup>Frank Feichtinger, who spent years investigating the history of Woody Island, and whose work product provides this Board with a wealth of useful data about the village, its inhabitants, their genealogy, and the role the village played in regional events, was asked whether he found that the village of Woody Island was a traditional village, to which he responded "I don't think there's hardly a more traditional village in Alaska than Woody Island." Tr. at p. 1374.

- (iii) The April 12, 1963 removal of FAA ferry service and subsequent scale back in FAA operations on Woody Island;
- (iv) Implementation of Borough real property taxes on Woody Island in the mid-1960's; and
- (v) The Vietnam War.

*(i) The March 27, 1964 Earthquake and Tidal Wave*

The March 27, 1965 earthquake and tidal wave was an Act of God occurring within the 10 years predating April 1, 1970 that caused the temporary abandonment of the Native Village of Woody Island. The Tsunami wave resulting from the earthquake wiped out the dock that had serviced Woody Island.

When a new dock was built, it suffered from a serious flaw: the new dock was shorter and narrower. The reduced size of new dock subjected boats to rip tides that caused the boats to smash up against the dock. The RD observes that "[T]he 1964 event rendered Woody Island more difficult to access. The western shoreline subsided, making it more difficult to beach boats, and the dock was destroyed and replaced by one which was more exposed to strong currents and tides, rendering it less safe for mooring boats." Recommended decision at p. 88. Stratman's own witness, Tim Smith, described how the new dock was much less functional to Woody Islanders than the old one that existed prior to the earthquake:

"Q. Now, we talked about the dock having been replaced shortly after the 1964 earthquake and tidal wave.

"A. That's correct.

"Q. Would you please elaborate what the differences were between the dock that was there before the

earthquake and the dock that was put in after the earthquake?

"A. The dock was approximately twice as wide before the tidal wave. It was a very sturdy and long dock, as well, and it extended approximately this much further, I guess a third further, at least, into the, into the ocean... I overheard Darryl complaining, Darryl Chaffin complaining about the dock, that they had put it in too short, because it's the length more than the width that are, that was important. A little bit further out and you miss some of the, some of the strong currents that go right past the shore there... [T]he times that we tied up the EVANGEL to the dock **it was like getting pounded to death**; just, you know, into the pilings, constantly crashing into the pilings, and a very uncomfortable place. It would be very unusual, for example, to be able to spend the night tied up to that dock."

Tr. at pp. 2005-2007.

Stratman's witness, William Cordry, who operated the *FedAir IV* starting in May of 1969, testified that he could not leave the boat tied to the new, short dock at Woody Island because the wind and tide would "**just beat the devil out of that boat.**" (Tr. at pp. 410-411.)

The earthquake also resulted in Woody Island dropping about five feet, so of its beach where small skiffs could have been pulled up<sup>135</sup>, and caused the loss

See, testimony of Kelly Simeonoff, Jr. at p. 2755.<sup>136</sup>

The earthquake also damaged the water system on Woody Island:

"Q. What would stop the water from simply flowing all the way out, out through the pipes after --

A. What would stop it?

Q. Yeah, was there anything plug or anything at the, the end of piping?

A. Well, the earthquake might have, because they had the water main that went down to the dock there, and the dock went it took the end of the pipe with it, so you have a heck of a time keeping the tank full. You couldn't shut it off.

Q. Okay. So, after the earthquake, then, the water would just keep flowing out. You couldn't, you couldn't shut it off. There was no plug at the end because that would have been at the dock; is that what you were saying?

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<sup>135</sup>Mike Waller described how "[B]efore the tidal wave ... [w]here the ferry used to tie up, they had a little ramp. You could hit a little button and you could bring the ramp up and down. You didn't have to do anything heroic to bring up your boat... So, that was pretty convenient. You could tie your skiff up. You could leave it, walk around. I didn't have to worry about the tides or anything... But after the earthquake a lot of that got submerged, got washed. And before the tidal wave, there was more beach over there than after the tidal wave. This end of the island sunk somewhat. So, it got a lot harder to get to." Tr. at p. 3133.

<sup>136</sup>Kelly Simeonoff, Jr. testified that [A]fter the tidal wave I know we went looking at some of the, some of the places... One, one of the things that the, we had that, that was rare was a place for, for cockle claims, and those were gone. The reefs, we couldn't get a lot of the things that, that that we used to. **And clams were basically nonexistent after '64.**" Tr. at p. 2755.

A. It's a moot point to try to fill the tank, because you couldn't keep it full."

Depos. Tr. of Mitch Gregoroff at p. 1410-1411.<sup>137</sup>

Tina Simeonoff Hoen also described the impact of the damage to the water system. She stated that as a result one of the aftershocks in the earthquake, "The cap in the end of the pipe burst and all the water ran out the, the face of the dock underneath and we had no water." Depos. Tr. at p. 2972. When asked what she did for water then, she stated "I had built my daughter a little wagon from a Olympia beer box and four carriage wheels, and I would put her in the, the cart with a five-gallon kerosene can and go to the lake." Tr. at p. 2972.

Stratman's own witness, Tim Smith, described the failure of the water system that fed the South Village area:

"It, it was after -- Right. It was after this, this discussion, sometime between '64 and, and I would say '70, that the, that the pipes feeding this area, this leg of, of the water system, the, the South Village failed... And the, the gist of the conversation was that my father said that if there was a way to get new pipes up to the tank there would be water, but that was essentially the responsibility of whoever needed the water; the Mission wasn't really able to provide that."

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<sup>137</sup>The RD implies that the Natives should have fixed the damage to the water system caused by the earthquake and Tsunami wave: "[T]he remedy for the earthquake damage to the water system was to cap the end of the 6 to 8 inch pipeline leading to the dock." RD at p. 89. In fact, the Natives tried, but failed, to repair the line: "My brothers worked at it, but they didn't get it fixed either... Tried to seal the flow of water off there where the dock area was ... so that they could fill the tank..." Q. "They just couldn't make that happen, couldn't couldn't find a way to seal off that pipe?" A. "No, it was too big." Tr. at p. 1449. The Native Woody Islanders were apparently not skilled welders at that time. Maurice Harmon, however, thereafter moved to Washington where he went "to welding school through the Bureau of Indian Affairs". He stated that there was no welding school in Kodiak. Tr. at p. 1621. He had to move to Washington to get the training because the BIA "told us that that was the place we had to go to get training." Tr. at p. 1626.

Testimony of Tim Smith, Tr. at pp. 1942-1943.

Not only did the earthquake damage the pipe system, but it also lowered the fresh water lagoon so that saltwater infiltrated it and made it undrinkable. Tina Simeonoff Hoen was asked which lake she took the cart with the five-gallon kerosene can to in order to get water:

"Q. Which lake?

A. Upper Lake.

Q. Why couldn't you use Lower Lake as a source of water?

A. It was saltwater...

Q. Had that always been saltwater?

A. No...

Q. What caused that to become saltwater rather than fresh?

A. The -- the water washed the flume out and the island sunk just like the rest of Kodiak. We lost an awful lot of shoreline."

Tr. at p. 2973.<sup>138</sup>

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<sup>138</sup>Tina Hoen testified that the water supply in Kodiak had also been affected by the earthquake: "The water supply was very nasty. Old, very old pipes had gotten shaken up considerably, so a lot of the muck that had settled in them over the, the years was still sifting through the pipes. I remember the water was mostly brown. Because the downtown area was so torn up it was extremely dirty." Tr. at p. 2970. Tina therefore moved for a few months over to Woody Island, and used fresh water from Upper Lake to fill a five-gallon kerosene can that she hauled with a little wagon. Tr. at pp. 2971-72. Thus, although the pipes on Woody Island no longer provided fresh water, and Lower Lake could no longer be used for fresh water, the RD recommends the Board twist this incident of Tina Hoen's relocation to Woody Island for a few months into a false conclusion that the damage to Woody Island's own water supply as a result of the earthquake was not a factor in causing people leaving Woody Island in the 1960's: "No one left the island as a result of the earthquake, but, rather, one or two



Although there were wells available at some of the homes on Woody Island, the loss of the fresh water running through the pipes, and the loss of Lower Lake as a source of fresh water adversely impacted the ability of the Native Woody Islanders to live on Woody Island and was a proximate cause of the temporary abandonment of the village that Leisnoi, Inc. asserts as an alternative basis for its certification under 43 CFR §2651.2(b)(2).

The earthquake also caused a loss of job opportunities for the Native Woody Islanders, and caused some of them to move out of state. The RD erroneously recommends that this Board find "There is no substantial evidence of earthquake-caused reductions in employment opportunities inducing natives to leave Woody Island...". In fact, ample evidence of the terrible impact that earthquake had on the lives of the Native Woody Islanders was presented at the hearings:

“Q. So the canneries were wiped out by the tidal wave?

A. All of them, yeah.

Q. And did you know people who worked in the, the canneries?

A. Well, I worked there off and on part-time. I was working there --

Q. And --

A. -- off and on after the, the fire, after the boat yard burned down. I worked there off and on.

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families actually returned shortly thereafter to stay for many months.” Recommended decision at p.88.



Q. So did the earthquake, then, limit the job opportunities for people who lived on Woody Island?

A. I would say so.

Q. Okay. Can, did you have occasion to move out of Alaska?

A. Well, at the time I felt that I had to. There was, I didn't have no income, and there was no work at all. I mean, they was going to rebuild, but it wasn't right away. You know, there was that span in between there where I couldn't stick around and wait. So, my wife was already in Washington, so I just come one down. She was down on vacation at the time of the quake.

Q. And so the, yeah, you moved to Washington then in 1964, is that correct?

A. Yeah."

Depos. Tr. at Mitch Gregoroff at pp. 1434-1435.

Stratman's own witness, Harold Naughton stated that the FAA previously had provided the only employment opportunity on Woody Island; when asked if a Native lived on Woody Island "would have to come to Kodiak to work; is that, is that fair?" he responded "That's, that's right." Tr. at pp. 264-65.

James Hartle, when asked why he had moved back to Woody Island testified "There's no employment for me." Tr. of Testimony of James Hartle at p. 1655. Stratman's witness, Bill Torsen, had testified that the FAA had provided job opportunities to the Native residents of Woody Island. Tr. at p. 2079.

The earthquake and Tsunami wave obviously had multiple adverse consequences for the Native Woody Islanders.<sup>139</sup> It qualifies as an Act of God that occurred within a period predating April 1, 1970 that resulted in a temporary abandonment of the Native Village of Woody Island.

**(ii) The May 27, 1969 Closure of the School on Woody Island**

The closure of the school on Woody Island was another event that contributed to the temporary abandonment of the Native Village of Woody Island:

“[T]he Woody Island School was last operated ... during the 1968-69 school term. The last day of school that year was May 27, 1969. The reason for closing the school was the removal of all personnel from the site.”

Letter of Robert C. Greene, Superintendent, Kodiak Island Borough School District, BIA 1A at p. 21.<sup>140</sup>

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<sup>139</sup>Wilton T. White, the Chairman of the Kodiak Island Borough, described the deleterious effect of the earthquake upon the Native Woody Islanders:

“The village of Woody Island, located in the Kodiak Island borough, suffered damages due to an act of God; the earthquake and tidal wave disaster of March 27, 1964, which resulted in causing villagers subsequently to employ, when using the village, a lifestyle which, while unusual, is consistent with the native’s own cultural patterns and life style, i.e., living in temporary shelters or tents or aboard boats moored in the village harbor rather than in more conventional housing, or using the village as a basis from which to go elsewhere to hunt and fish or otherwise seek a livelihood and thus oftentimes not spending continuous nights in the village, all of which are consistent with the cultural patterns and lifestyle of the Natives of the Kodiak region.”

July 26, 1973 Affidavit of Wilton T. White, Chairman of the Kodiak Island Borough (BIA 1A at p.53.

<sup>140</sup>William Cordry, who operated the *FedAir IV*, confirmed that in 1969, the school on Woody Island was closed because the FAA was moving most of its people to Kodiak. (Tr. at p. 428.)